No. 18777

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNADEANE O'NEAL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court is predicated upon Rule 35 of the Federal Rules of Criminal Procedure. Insofar as the Court acted to correct an illegal sentence, *i.e.*, the striking of the provision relating to parole, its jurisdiction is not challenged by Appellee. Rule 35 provides for such correction at any time.

This Court has jurisdiction to review that judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294. The order of the District Court was entered on March 12, 1963 [C. T. 10][1]. Appellant filed a timely notice of appeal on March 22, 1963 [C. T. 13].

However, it is the position of the Government that at the time of the hearing on the motion to reduce sen-

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[1]C. T. refers to Clerk's Transcript of Record.

tence [C. T. 2], the denial of which motion is herein appealed, the District Court lacked jurisdiction to reduce the sentence. That hearing took place on March 11, 1963.[2] This was more than 60 days after receipt by the District Court of the mandate affirming the original conviction. The mandate was received on January 3, 1963.[3]

II.

STATUTES INVOLVED.

Rule 35, Federal Rules of Criminal Procedure:

> "The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

Rule 45(b), Federal Rules of Criminal Procedure:

> "Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable

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[2]See Reporter's Transcript.

[3]See Certificate by Clerk of District Court, Southern District of California.

neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal."

Section 174 of Title 21, United States Code:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.

* * * * *

"For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.' "

Section 7237(d) of Title 26, United States Code:

"No suspension of sentence; no probation; etc.— Upon conviction—(1) of any offense the penalty for which is provided in . . . subsection (c) . . . of section 2 of the Narcotic Drugs Import and Export Act, as amended. . . ."

". . . the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, . . ."

Section 4208 of Title 18, United States Code:

> "(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which even the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

Section 7 of Public Law 85-752, 72 Stat. 847 (1958):

> "This Act does not apply to any offense for which there is provided a mandatory penalty."

III.

STATEMENT OF THE CASE.

Appellant was one of four defendants indicted on November 18, 1959 [T. R. 2][4], for violation of Title 21, United States Code, Section 174. The other defendants entered pleas of guilty to one count each. Appellant pleaded not guilty, and her case was tried by a jury before the Honorable Leon R. Yankwich, District Court Judge. Appellant was found guilty on two counts, one alleging the unlawful receipt, concealment

[4]T. R. refers to Transcript of Record in Appeal 17,966 in this Court, a prior appeal in this case.

and transportation of 506 grams, 530 milligrams of heroin; the other count charging conspiracy to unlawfully receive, conceal, sell, and transport heroin. On March 1, 1960, the Court sentenced Appellant and two other defendants to imprisonment for a period of 10 years each [T. R. 115, 116, 117]. Each judgment contained the following proviso:

> "It Is Further Ordered that the defendant may become eligible for parole as the Board of Parole may determine, pursuant to Section 4208, Title 18, U. S. C. A. . . ."

The fourth defendant had been previously sentenced, on February 25, 1960, to imprisonment for a period of five years [T. R. 112, 113].

Upon appeal by Appellant, this Court affirmed the judgment on November 21, 1962. *O'Neal v. United States,* 310 F. 2d 175 (9th Cir. 1962). The mandate, issued upon such affirmance, was received by the District Court on January 3, 1963.[5]

It was apparently learned by Appellant that the Attorney General was challenging the validity of the proviso in her sentence allowing parole under Section 4208. On February 21, 1963, Appellant applied to the District Court in which she had been sentenced for a reduction of her sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure [C. T. 2].

On March 11, 1963, a hearing was held on Appellant's application.[6] The following day, the Court entered the order which denied Appellant's application and struck the parole proviso from her sentence [C. T. 10].

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[5]See note 3, *supra.*

[6]See Reporter's Transcript.

IV.
SUMMARY OF ARGUMENT.

1. The provision relating to parole in Appellant's sentence was unlawful, and was therefore properly struck by the Court below. In this respect, the reasoning and authority of the recent case of *Rivera v. United States,* 318 F. 2d 606 (9th Cir. 1963), is principally relied upon.

2. At the time of the hearing on Appellant's motion and thereafter the District Court lacked jurisdiction to reduce the sentence. Consequently, even if it so desired, the trial court could not have granted the requested relief. In support of this view, the Government relies on both judicial authority and the express language of Rules 35 and 45(b) of the Federal Rules of Criminal Procedure.

3. Even if this Court were to treat Appellant's application as proper, the judgment of the trial court should not be reviewed, inasmuch as the sentence was within the limits of the statute.

4. And examination of the record reveals no abuse of discretion.

V.
ARGUMENT.

A. The Court Below Properly Struck From the Sentence the Proviso Relating to Parole.

Appellant in her opening argument contends that the trial judge erred in striking the provisions for parole from the original sentence. In support of this position, Appellant makes an interesting distinction between parole under Section 4202 and parole under Section 4208

of Title 18, United States Code; notes further that Section 7237(e) of Title 26, United States Code, was never amended to preclude parole under Section 4208; labels Section 4208 as a " 'remedial' statute of humanitarian intent" which should not be restricted; and concludes that Congress only intended to deny parole during the mandatory minimum period of sentence.

However ingenious Appellant's argument may be, it overlooks the legislative intent behind the Narcotic Control Act of 1956 and the intent behind Section 4208. Also disregarded is Section 7 of the same statute which enacted 4208:

> "This Act does not apply to any offense for which there is provided a mandatory penalty." Public Law 85-752, 72 Stat. 847 (1958).

This very question came before this Court recently in the case of *Rivera v. United States,* 318 F. 2d 606 (9th Cir. 1963). A prisoner brought a motion under Title 28, United States Code, Section 2255, which challenged the validity of a sentence almost identical to the one at hand. This Court held that the provisions of Section 4208 are inapplicable to narcotic offenses under Title 21, United States Code, Section 176(a).

See also *Robinson v. United States,* 313 F. 2d 817 (7th Cir. 1963), where the Court held that the provisions of 4208 did not apply to violations of Section 174, Title 21, United States Code.

B. The Denial of Appellant's Motion for Reduction of Sentence Was Proper Inasmuch as the Trial Court Lacked Jurisdiction to Grant the Motion.

The remainder of Appellant's brief is devoted to the reasonableness of the lower Court's opinion in denying Appellant's motion. Appellee submits that whether the trial court was reasonable or not is immaterial because that court had no power to reduce the sentence.

The mandate of this Court affirming the previous judgment was received by the District Court on January 3, 1963.[7] Appellant filed her motion to reduce sentence on February 21, 1963 [C. T. 2]. The hearing occurred on March 11, 1963.[8] It is submitted that at the time of that hearing, the Court below had lost jurisdiction to reduce the sentence.

Rule 35 of the Federal Rules of Criminal Procedure allows the Court to reduce a sentence "within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal." It will be noted that the language calls for the reduction within 60 days, rather than for a reduction upon "motion filed within 60 days."

Furthermore, it is clear from a reading of other Rules, that where the intent is only to restrict the time for filing a motion and not the power of the court, such intent is expressed. For example, see:

Rule 33,

> "A *motion* for a new trial based on any other grounds *shall be made within 5 days* after verdict or finding of guilty or within such further time

[7]See note 3, *supra.*

[8]See Reporter's Transcript.

as the court may fix during the 5-day period." (Emphasis added).

Rule 34,

"The *motion* in arrest of judgment *shall be made within 5 days* after determination of guilt or within such further time as the court may fix during the 5-day period." (Emphasis added).

The decisive Rule, however, is 45(b). It provides in pertinent part:

"When an act is required or allowed to be done at or *within a specified time, the court for cause shown* may . . . order the period enlarged if application therefor is made before the expiration of the period originally prescribed . . . but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal."

The Supreme Court also takes the view that after the 60 days have lapsed, the trial court has no power to reduce a sentence rendered by it. In *United States v. Robinson,* 361 U. S. 220, 80 S. Ct. 282 (1960) (dictum), the Court held that the Circuit Court of Appeals had no jurisdiction over an appeal which was filed after expiration of the time prescribed in Rule 37(a)(2). The Court stated, at 225:

"If, as the Court of Appeals has held, the delayed filing of a notice of appeal—found to have resulted from 'excusable neglect'—is sufficient to confer jurisdiction of the appeal, it would consistently follow that a District Court may, upon a like finding, permit delayed filing of a motion for new trial under Rule 33, of a motion in arrest of

judgment under Rule 34, and the reduction of sentence under Rule 35, at any time—months or even years—after expiration of the period specifically prescribed in those Rules.

"This is not only contrary to the language of those Rules, but also contrary to the decisions of this Court." (Footnotes omitted).

For examples of other decisions where the sixty-day requirement is treated as jurisdictional see, *Urry v. United States,* 316 F. 2d 185 (10th Cir., 1963); *United States v. Chicago Professional Schools, Inc.,* 302 F. 2d 549 (7th Cir. 1962); *United States ex rel. Quinn v. Hunter,* 162 F. 2d 644 (7th Cir. 1947); *United States v. Baker,* 170 F. Supp. 651 (E.D. Ark. 1959), *aff'd,* 271 F. 2d 190 (8th Cir.); *United States v. Howell,* 103 F. Supp. 714 (S.D. W. Va. 1952), *aff'd,* 199 F. 2d 366 (4th Cir.); *United States v. Martin,* 8 F.R.-D. 89 (W.D.S.C. 1948), *aff'd,* 168 F. 2d 1003 (4th Cir.), *cert. denied,* 335 U. S. 872.

The rule is a sound one. It substitutes for the varying periods resulting under the old term rule a constant and reasonable time in which to modify a sentence improvidently made. But as the Supreme Court has pointed out, "the Rules, in abolishing the term rule, did not substitute indefiniteness. On the contrary, precise times, independent of the term, were prescribed. The policy of the Rules was not to extend power indefinitely but to confine it within constant time periods." *United States v. Smith,* 331 U. S. 469, 473-474 67 S. Ct. 1330 (1947). See also the Advisory Committee Notes, reprinted in 4 Barron, Federal Practice and Procedure 303, at n. 24 (Rules ed. 1951).

In view of the foregoing, it is respectfully submitted that Appellant was not entitled to a reduction in sentence on March 11, 1963, and consequently the Court's refusal to grant such relief cannot now be reviewed.

C. Assuming That Appellant Had Brought a Proper Motion, the Reduction of Sentence Is Within the Trial Court's Sole Discretion and Not Subject to Review.

This Court may wish to treat Appellant's application as a motion under 28 U. S. C. §2255, the theory being that the inclusion of the invalid proviso rendered the whole sentence unlawful and subject to being vacated. See *Rivera v. United States,* 318 F. 2d 606 (9th Cir., 1963), and *Robinson v. United States,* 313 F. 2d 817 (7th Cir., 1963). Or, in the alternative, the Court may wish to regard the application as a motion under Rule 35 to correct an illegal sentence, the entire sentence being unlawful on its face, because of the included provision. The District Court would have jurisdiction over either of these motions.

It is undisputed that the ten year sentence was within the statutory limits. The question now is whether the trial court's decision should be reviewed. In this respect, this Circuit had adhered to the following principle:

> "'"If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." Gurera v. United States, 8 Cir., 1930, 40 F. 2d 338, 340.' Brown v. United States, 9 Cir., 1955, 222 F. 2d 293, 298." *Pependrea v. United States,* 275 F. 2d 325, 330 (9th Cir. 1960).

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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